No. 22,162

IN THE

United States Court of Appeals

For the Ninth Circuit

JOSEPH E. SEAGRAM AND SONS, INC., THE HOUSE OF SEAGRAM, INC., McKESSON AND ROBBINS INCORPORATED, BARTON DISTILLING COMPANY and BARTON WESTERN DISTILLING CO., *Appellants,* vs. HAWAIIAN OKE AND LIQUORS, LTD., *Appellee.*	USDC HAWAII No. 2418

Upon Appeal from the United States District Court
for the District of Hawaii

JOINT REPLY BRIEF ON BEHALF OF APPELLANTS

J. GARNER ANTHONY,
ROBERTSON, CASTLE & ANTHONY,
Ninth Floor, 333 Queen Street, Hololulu, Hawaii,
WHITE & CASE,
14 Wall Street, New York, N.Y.,
Attorneys for Appellants Joseph E. Seagram and Sons, Inc. and The House of Seagram, Inc.

MARTIN ANDERSON,
ANDERSON, WRENN & JENKS,
Bank of Hawaii Building, Honolulu, Hawaii,
Attorneys for Appellant McKesson and Robbins, Incorporated.

HERBERT Y. C. CHOY,
FONG, MIHO, CHOY & ROBINSON,
Finance Factors Building, Honolulu, Hawaii,
Attorneys for Appellants Barton Distilling Company and Barton Western Distilling Co.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

IV

V

Table of Authorities Cited

Cases

Rules

No. 22,162

IN THE

United States Court of Appeals

For the Ninth Circuit

JOSEPH E. SEAGRAM AND SONS, INC., THE HOUSE OF SEAGRAM, INC., MCKESSON AND ROBBINS INCORPORATED, BARTON DISTILLING COMPANY and BARTON WESTERN DISTILLING CO., *Appellants,* vs. HAWAIIAN OKE AND LIQUORS, LTD., *Appellee.*	USDC HAWAII No. 2418

Upon Appeal from the United States District Court for the District of Hawaii

JOINT REPLY BRIEF ON BEHALF OF APPELLANTS

ARGUMENT

I

INSUFFICIENCY OF EVIDENCE TO SUPPORT THE VERDICT

A. Lack of evidence of agreement between Seagram and Barton precludes application of Per Se Rule

Plaintiff does not dispute that a horizontal agreement is necessary for a group boycott and that the jury would have had to find either an agreement between two or more Seagram divisions or between Seagram and Barton to impose per se liability. The divisions of Seagram cannot conspire among themselves (Op. Br. pp. 13-26), hence a finding of conspiracy between Seagram and Barton is essential to sustain the verdict.

1. Plaintiff's version of the facts

Plaintiff, while admitting from the start (Tr. I: p. 22) that no one at Barton ever communicated with or agreed with any one at Seagram, argues that concerted action can be inferred from the "totality" of the circumstances. These are discussed below.

a. Calvert's "repeated commendation" of Hawaiian Oke

Calvert "repeatedly complimented" Hawaiian Oke for its performance, says plaintiff, and this was a significant factor supporting the conclusion that Calvert changed for reasons other than dissatisfaction (Br. pp. 16-17; 42-43).

The statement (Br. p. 16) that Arthur Murphy "repeatedly complimented" Hawaiian Oke (citing Exhibits P-49 and P-60 and Tr. 2660) is false. The references are to a *form* letter mailed to plaintiff along with every other distributor in the country thanking them for their contribution to the resurgence of Calvert.

The form letter hardly supports the assertion that Murphy "repeatedly complimented" Hawaiian Oke. No record reference is cited to support it.[1]

Plaintiff then says (Br. p. 16) that Gonzales noted "significant improvement" in Hawaiian Oke and that it was doing a good job, citing Tr. 1659. What Gonzales said was that only after he came to Hawaii to help Hawaiian Oke (at large expense to Seagram) was there any improvement. He testified:

> Well, you know when you use percentages, if you are selling one case and you sell two, you know that is 100 percent increase. So, percentagewise, I suppose the increase was quite large. Casewise, from the standpoint of the number of cases, it still was, you know, still not much (Tr. IV: 1659.)

---

[1]Rule 3 of this Court imposes this duty on appellee. See also, *Lange v. Curtin,* 11 Cal.App.2d 161, 165, 53 P.2d 185, 186 (1936).

This was not evidence of a "significant improvement."

Again, plaintiff says (Br. p. 17) that Novak of Calvert "expressed approval" of Hawaiian Oke's job. Novak said:

> I was highly unsatisfied with the progress we were making with Calvert Extra. This was our primary line and we were well behind quota on Calvert Extra, which is the mainstay of our entire business. (Tr. 1260.)

Exhibit M-39, a letter from Novak, said:

> . . . we are in good shape on Calvert Gin . . . but we are far behind on Calvert Extra. (Tr. 2580.)

To call this "repeated commendation" makes a mockery of this record.

Plaintiff's total case sales had improved. This does not suggest that Calvert was satisfied. Calvert sales everywhere in the country had boomed. Plaintiff admitted that Calvert had complained and that its distribution was poor (Tr. II: 457; 458; 616-618; V: 2133-2135). Following the letter of "commendation," Novak expressed dissatisfaction with Calvert performance (Ex. M-32) which Wong admitted (Tr. V: 2133).

Plaintiff admits (Br. p. 35) that Calvert originally approached McKesson to discuss a change. No explanation was suggested why it did so if it were "happy" with plaintiff. It is impossible to conclude that Calvert approached McKesson for any reason other than dissatisfaction with Hawaiian Oke. No other finding has support in the evidence.

b. McKesson's failure to consider lines not carried by Hawaiian Oke

Plaintiff says that McKesson sought only lines carried by Hawaiian Oke which is a suspicious circumstance supporting an inference of a conspiracy. Referring to the June meeting, it says:

> Significantly, all of the lines then discussed were distributed by appellee, Hawaiian Oke. (Br. p. 8.)

This is false. Maloney (McKesson) testified that Christian Brothers and a beer line were discussed (Tr. 674). Hawaiian Oke carried neither (Tr. II: 352; Tr. I: 295-296).

Plaintiff further says that McKesson never considered other lines. (Br. p. 36.)

Again, a bald misstatement. Maloney approached Alfred Fromm and Jack Welsch of Fromm & Sichel to solicit the Christian Brothers line (Tr. II: 724-725; Ex. P-72). Cotler of McKesson solicited Browne Vintners line, but was unsuccessful (Tr. II: 371).

In the light of the record, plaintiff's statements are astounding.

c. The Barton Products Mix

Barton was dissatisfied because plaintiff sold too much "white goods" in relation to more profitable "brown goods." Plaintiff says brown goods "were increasing both proportionately and in volume" (Br. p. 18). Barton never complained about volume. Plaintiff's assertion is a clear distortion. It cites Exhibit P-19 which shows sales by Hawaiian Oke.[2]

Year	Brown Goods Cases Sold	White Goods Cases Sold	Brown Goods Percentage	White Goods Percentage
1962	1975	1310	60.1	39.9
1963	2050	1732	54.2	45.8
1964	2843	3305	46.2	53.8
1965 (Jan-Aug)	1907	2050	48.2	51.8

[2]Plaintiff stated that it had verified the data as to Exhibit P-19, Barton's second set of interrogatories (Tr. II: 525). These figures have been translated into graph form in Exhibit B-57.

Thus, the ratio of brown goods sold dropped from 60% to 46% from 1962 through 1964 and made a slight recovery in early 1965. The evidence is uncontradicted that when Barton made the change, the ratio had declined sharply from previous years. A finding that Barton was satisfied with the product mix cannot be supported.

d. Barton's dissatisfaction with plaintiff's delinquency in paying bills

Barton had been so concerned about plaintiff's slowness in paying its bills that from 1963 to 1965, it wrote many letters to plaintiff expressing its concern, and had already on October 9, 1963, decided to "make a jobber change" when the opportunity presented itself. (Ex. B-34; Op. Br. pp. 5-6.)

2. Irrelevancies relied on by plaintiff to support a finding of conspiracy

Plaintiff attempts to support a finding of conspiracy by creating the impression that the formation of Portside was an abnormal business practice surrounded by suspicious circumstances. It argues that this, coupled with the parallel behavior of Barton and Seagram, comprise the "totality" of facts from which an inference of conspiracy could be drawn.

Several "suspicious" circumstances are not borne out by the record, others are irrelevant. To create a suspicion, plaintiff raises questions about aspects of the case on which there is no dispute, apparently in the belief that by asking a question, one can create doubt where none exists.

a. Intracorporate conspiracy

While claiming that the error was harmless and moot, plaintiff dwells at length on the evidence of intracorporate conspiracy. The sufficiency of the evidence on this issue has not been argued, but we say that agreements among the Seagram divisions are not proscribed (Op. Br. pp.

13-20) and that an agreement between The House of Seagram and Joseph E. Seagram and Sons, Inc. is lawful in the absence of an unreasonable restraint, of which there was no evidence here (Op. Br. pp. 27-36).

b. Uniqueness of McKesson's second house

Plaintiff tries to raise suspicion by asking why McKesson would open a second house in Hawaii when it had not done so before (Br. p. 37). It had answered this question earlier saying Calvert "would be understandably reluctant to have its line—which competes directly with '7-Crown' and 'V.O.'—distributed by the same wholesaler" and "McKesson likewise preferred . . . separate houses for the distribution of these competing lines" (Br. p. 6).

There is nothing suspicious about this. The reason was never in dispute. Plainly, no inference of conspiracy could be drawn from this; nor can it be tortured into a "suspicious" factor to be considered in the "totality" of the evidence to warrant an inference of conspiracy.

c. Portside's incomplete staff

The fact that the staff for Portside was not complete at the time of the change is no evidence from which one can infer Seagram-Barton collaboration. If McKesson were an unknown quantity, it might raise a question, but McKesson was distributor for both Barton and Seagram on the mainland. Both were acquainted with its executive personnel and operations (Tr. II: 766; IV: 1439). Murphy testified that McKesson had been successful in handling Calvert products (Tr. IV: 1439). Hence, there is nothing unusual in relying on McKesson to staff its new house. If any inference could be drawn, it is that Barton and Seagram were both so dissatisfied with Hawaiian Oke that they were willing to change even before the staff of Portside was set.

d. The secret negotiations

Plaintiff dwells on the fact that the negotiations on the formation of Portside were carried on unknown to plaintiff. There is nothing suspicious about this. It would be strange if it were otherwise. See, *e.g.*, *Ace Beer Distributors v. Kohn, Inc.*, 318 F.2d 283 (6th Cir. 1963), cert. denied 375 U.S. 922. Moreover, even if one could legitimately criticize the parties for not informing Hawaiian Oke of the possible loss of lines, the failure to disclose it earlier in no way logically suggests a concert of action between Barton and Seagram. This is another "makeweight" used by plaintiff in its attempt to create a "totality" of suspicious circumstances where none exist.

e. The Kauhane memo

As "evidence" of a Seagram-Barton connection, plaintiff points to Exhibit P-71. This is an intra-office McKesson memo from Kauhane to Maloney in which Seagram, Barton and other lines are mentioned. A note on the memorandum suggests that Maloney "clear the whole matter with Seagram & General Wine."

This memo is not admissible as against Seagram or Barton in the absence of independent evidence establishing, prima facie, that they were members of a conspiracy. *Standard Oil of California v. Moore,* 251 F.2d 188, 210 (9th Cir. 1958), cert. denied 356 U.S. 975. None was produced.

Even if admissible, it fails to prove any Seagram-Barton connection. Whatever inferences one can draw from the memo, one cannot logically conclude that any agreement, express or tacit, existed between the two suppliers. At most, it shows that Seagram may have known that Barton was one of the several lines being considered by McKesson. One might also infer that McKesson was

seeking an assurance from Seagram that it would not object to any of the proposed lines. McKesson already knew that an objection had been raised to placing Calvert and 7-Crown in one house. That Seagram had no objection to the presence of Barton or other lines mentioned in no way tends to prove any agreement or mutual understanding with Barton.

The questions raised by plaintiff (Br. pp. 37-38) not already discussed, all relate the intracorporate aspect of the case and in no way establish any link between Barton and Seagram. What plaintiff's case boils down to is McKesson's "plan" and the parallel action by Seagram and Barton.

3. Inapplicability of Interstate Circuit

Absent proof of an agreement between Seagram and Barton, plaintiff relies on *Interstate Circuit, Inc. v. United States,* 306 U.S. 208 (1939) and its progeny (Br. pp. 38-44).

The "plans" referred to in *Interstate Circuit, United States v. Paramount Pictures,* 334 U.S. 131 (1948), *United States v. United States Gypsum Co.,* 333 U.S. 364 (1948), and *United States v. Masonite Corp.,* 316 U.S. 265 (1942) are all distinguishable.

a. Complex and elaborate parallelism

The cases cited by plaintiff involved complex and elaborate plans. There the defendants entered into detailed agreements containing identical terms of pricing and other practices. As we pointed out (Op. Br. pp. 22-23), where the situation permits a variety of possibilities, but where the defendants' actions are nonetheless identical, logic and common sense permit the conclusion that the result was reached by agreement. Cf., *Delaware Valley Marine*

Supply Co. v. American Tobacco Co., 297 F.2d 199 (3d Cir. 1961), cert. denied 369 U.S. 839.

Here, the situation did not permit much scope of action to Barton and Seagram. They could either go with Portside or stay with Hawaiian Oke. That both left is insufficient to establish a conspiracy.[3]

b. High degree of pervasiveness

The conduct in *Interstate Circuit* and similar cases also differs from that here in its pervasiveness. In those cases, numerous competitors adopted identical practices. The more participants, the less likely that identical action resulted from independent decision.

Here, two suppliers decided to change distributors. To permit a jury to find that such action was based on agreement is to permit a verdict based solely on speculation.

c. Anticompetitive motives

In each of the *Interstate Circuit* type cases, the participants all had anticompetitive motives for participating. The only motive here of either Seagram or Barton was to get a better distribution.

In *First National Bank of Arizona v. Cities Service Co.*, ... U.S. ...., 20 L.E.2d 569 (May 20, 1968), the Court affirmed summary judgment for the defendant although the plaintiff had relied on *Interstate Circuit* to establish a concerted refusal to deal. As here, plaintiff *had introduced evidence other than the simple refusal to deal* which it claimed showed suspicious circumstances and which

[3]Plaintiff's attempt to distinguish the *Delaware Valley* case (Br. p. 43) is fallacious. There the suppliers could have said, "I will refuse to deal with plaintiff if the others do likewise." The question, as in every parallel behavior case, was whether a jury finding to that effect was warranted by the circumstances surrounding the particular conduct. The Court held it was not. The directed verdict was affirmed.

coupled with the parallel behavior allegedly justified the inference of concerted action. 20 L.Ed.2d 587-589. It was also able to show that *a plan to boycott the plaintiff did exist, that the defendant had been invited to participate,* and that the defendant thereafter did refuse to deal with the plaintiff.

The Court reviewed the so-called suspicious circumstances and found that, as is the case here, the evidence was "not reasonably susceptible to the interpretation sought to be placed on it by petitioner." 20 L.Ed.2d 589. Left then only with the invitation to participate in the plan and the parallel refusal to deal, the Court distinguished *Interstate Circuit:*

> The reason that the absence of direct evidence of agreement in *Interstate Circuit* was not fatal is that the distributors all had the same motive . . . Here (the plaintiff) is unable to point to any benefits to be obtained by (the defendant) from refusing to deal with him and, therefore, the inference of conspiracy sought to be drawn from 'parallel refusal to deal' does not logically follow. (20 L.Ed.2d 591.)

Here plaintiff pitched its entire argument to the jury and to this Court on the theory that Seagram and Barton had no good business reasons for terminating their distributorships. It failed to produce any evidence that anticompetitive motives prompted their actions, relying instead on their parallel behavior. However, as the Court stated in *Cities Service:*

> . . . (T)o suggest, as petitioner does, that (defendant's) participation in the conspiracy is shown by its failure to deal with him is itself to rely on motive. (20 L.Ed.2d 587.)

The only motive the jury could have found in this case was a desire to gain better distribution. However, unlike the anticompetitive motives in *Interstate Circuit,* such a

motive is consistent with independent decision. Therefore, as the Court held in *Cities Service:*

> . . . (T)he inference that (defendant's) failure to deal was the product of factors other than conspiracy (is) at least equal to the inference that it was due to conspiracy, thus negating the probative force of the evidence showing such a failure. . . . (20 L.Ed.2d at 587.)

In *Cities Service,* the plaintiff argued that he was not obliged to show *why* the defendant conspired, only that it *did.* The Supreme Court, while granting this was true enough where a conspiracy was shown, ruled that it was necessary to show motive where the plaintiff was trying to prove the existence of a conspiracy by circumstantial evidence consisting of parallel refusals to deal. (Id. at 586-587.)

d. Cooperation of participants essential to success of plan

In the *Interstate Circuit* variety of cases, the success of the plan depended on the participation of all the defendants. As the Court pointed out in *Cities Service,* it was only because the cooperation of all was assured that the participants could afford to raise their prices without the risk of loss of business to competitors. Id. at 591.

Here, as we pointed out (Op. Br. pp. 25-26), no evidence supports the conclusion that the establishment of Portside depended on Barton. Thus, the element of interdependence was completely lacking.

e. Consciousness of commitment

As we also pointed out (Op. Br. pp. 25-27), the *Interstate Circuit* doctrine does not apply unless there is proof of some consciousness of commitment by the participants to each other. Plaintiff ignores *Klein v. American Luggage Works, Inc.,* 323 F.2d 787 (3d Cir. 1963) and *United*

States v. Standard Oil Co., 316 F.2d 884 (7th Cir. 1963) evidently realizing that its theory simply cannot be squared with these holdings.

f. Restraint of trade an essential feature of the plans

The plans in the *Interstate Circuit* type cases involved naked restraints of trade. It was evident to every participant that a restraint of trade was called for. *Interstate Circuit, United States Gypsum, Masonite* and *Paramount* involved price fixing. *Milgram v. Loew's, Inc.*, 192 F.2d 579 (3d Cir. 1951), cert. denied 343 U.S. 929 and *Wm. Goldman Theatres v. Loew's, Inc.*, 150 F.2d 738 (3d Cir. 1945) were naked attempts to destroy competitors.[4]

Here, there is no evidence that non-dealing with Hawaiian Oke was a requirement for establishing Portside. There is no evidence that it mattered to Seagram or Barton whether the other continued to deal with Hawaiian Oke or dealt exclusively with McKesson. Splitting of lines and dual distribution had occurred before (Tr. I: 163-164; IV: 1458; VI: 2324). This was something each supplier worked out on its own with McKesson.

B. An agreement between Seagram and Barton to participate in the formation of Portside is not a group baycott

Plaintiff contends that the evidence sustains a finding that Seagram and Barton made their participation in Portside conditional on the participation of the other. Although the evidence does not support this, we have shown in our opening brief (pp. 27-36) that assuming, *arguendo*, that such an "agreement" was proved, it does not constitute a "group boycott" or a "concerted refusal to deal."

---

[4]*Milgram* and *Wm. Goldman* must be read in the light of *Delaware Valley* and *Klein*, subsequent Third Circuit cases, and *Theatre Enterprises, Inc. v. Paramount Film Distributing Co.*, 346 U.S. 537 (1954).

In response, plaintiff simply puts forward the proposition that good business reasons do not save a concerted refusal to deal. In this circular argument, plaintiff assumes that "group boycott" and "concerted refusal to deal" are self-defining terms. The fallacy is obvious.

1. Discriminatory and exclusionary boycotts

An agreement to establish a common distributor is not a concerted refusal to deal, even though non-dealing with others results.

If Seagram and Barton had agreed to refuse to deal with Hawaiian Oke, they may not avoid liability by showing good motives. But if they decide to use Portside, and do not single out Hawaiian Oke for non-dealing, there is no boycott. It is no more an agreement to refuse to deal with Hawaiian Oke than to refuse to deal with any other distributor.

Similarly, it was not an attempt to exclude others from the market. Cf. *Radiant Burners, Inc. v. People's Gas Co.*, 364 U.S. 656 (1961).

Concerted action similar to that alleged here was found not to constitute a group boycott in *Instant Delivery Corp. v. City Stores Co.*, 1968 Trade Cases ¶ 72,454 (E.D. Pa. 1968). There, four retailers agreed to use a particular delivery service. A competitior of the service selected claimed a group boycott, citing *Klor's*. The court rejected its argument, stating:

> In the case at bar, the only "refusal to deal" with (plaintiff) was that inherent in the selection of some other carrier to perform the consolidated delivery service.
>
> . . . I find nothing in this record to evidence an intent to discriminate against or exclude (plaintiff). (1968 Trade Cases at pp. 85, 443.)

No case cited by plaintiff holds that the selection of a joint distributor constitutes a concerted refusal to deal. In every case, either someone has been singled out for non-dealing or the agreement has been an attempt to exclude others from the market.

Fashion Originators' Guild v. F.T.C., 312 U.S. 457 (1941);

Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951);

Associated Press v. United States, 326 U.S. 1 (1945).

Continental Ore Co. v. Union Carbide & Carbon Co., 370 U.S. 690 (1962) was a classic exclusionary boycott.

United States v. Trenton Potteries Co., 273 U.S. 392 (1927) and *United States v. Columbia Steel Corp.*, 334 U.S. 495 (1948) did not concern group boycotts. Other cases cited by plaintiff are discussed in our opening brief (p. 29).[5]

2. Requirement of non-dealing

In every case cited by plaintiff where the conduct was found to constitute a group boycott, the agreement, by its terms, required non-dealing, and the objective of each agreement was to withhold trade from others. In no case was the non-dealing an incidental result.

Here there is no evidence that non-dealing with Hawaiian Oke was required. As far as Barton and Seagram were concerned, each was free to work out whatever arrangement it wanted with McKesson.[6]

---

[5]It should be noted that plaintiff has ignored the cases cited at pp. 30-31 of our Opening Brief.

[6]Barton obviously would have supplied plaintiff with private label products (on satisfactory credit terms) just as it did with McKesson while plaintiff was its general distributor. (Tr. I: 1517.)

Thus, the evil of a real "concerted refusal to deal," denounced in *Klor's Inc. v. Broadway-Hale Stores*, 359 U.S. 127 (1959) is not present here.

3. Plaintiff's "Fait Accompli" argument

The argument that Hawaiian Oke is defenseless to protect itself because it was presented with a *fait accompli* is a sham issue. The same result would have occurred whether or not Seagram and Barton made their decisions independently. Whether Hawaiian Oke is presented with a *fait accompli* in no way turns on whether there was a mutual understanding or true parallel action.

Plaintiff's statement that the terminations occurred with "lightning like speed" (Ans. Br. 25) is not true. The Seagram lines continued for a month after notice (Tr. I: 153; Exs. S-10, 11, 12) and the Barton lines remained for almost two months (Tr. I: 180, 182).[7]

4. Non-dealing not the object

The quotation from *General Motors* (plaintiff's brief, p. 47) illustrates another distinction between a concerted refusal to deal and an agreement to establish a common distributor. There, the Supreme Court stated:

> . . . where businessmen concert their actions *in order to* deprive others of access to merchandise . . . we need not inquire into the economic motivation underlying their conduct. . . . (emphasis added.)

There is no evidence that Seagram and Barton had any understanding *in order* to deprive Hawaiian Oke of access to their products. If they agreed to anything (there is no evidence they did), it was to go with Portside and

---

[7]Plaintiff made no effort to secure replacement beyond two calls to friends in California, which were not pursued. (Tr. I: 289-303.)

get a better distributor. There was no intent to injure or coerce Hawaiian Oke.

5. Characteristics of group boycotts not present

In the agreement claimed here no particular trader or group was singled out for non-dealing. There was no attempt to exclude others from the market. It did not require the parties to refuse to deal with others. It did not restrict the freedom of the parties to trade at any time with whom they wish. It involved no plan to fix prices or monopolize. There was no anticompetitive element.

Conceivably an agreement to establish a common distributor might constitute an unreasonable restraint of trade. This would depend on the purposes of the agreement and the effects thereof on the marketplace. Cf., *United States v. Paramount Pictures, supra; United States v. Columbia Steel Co., supra* at 524-525. To condemn such an agreement as a concerted refusal to deal, however, cripples the freedom of traders to arrange adequate distribution, prevents the entry of newcomers into the market and virtually assures the continuation of the status quo. It rewards distributors who might be lazy, incompetent or dishonest. It defeats competition.

If, as plaintiff contends, the new house needed a well-rounded group of lines, it is both reasonable and consistent with legitimate competition for McKesson to seek conditional commitments. It would be reasonable for Barton and Seagram to want to know what other lines the new house would handle.

A "plan" of the kind claimed here must be tested by the rule of reason rather than be struck down by a mechanical application of the "group boycott" label.

II

THE COURT ERRED IN THE ADMISSION AND REJECTION OF EVIDENCE ON LIABILITY

A. The Friedman statement

Ted Wong was allowed to testify that Sheldon Friedman of Barton "guessed" that the change of distributors might have been due to "deals" between Seagram and McKesson. A more inflammatory statement to a jury in an antitrust case can hardly be imagined. Plaintiff claims this was admissible to show Friedman's state of mind. It argues that it tends to show that Barton did not terminate for good business reasons, since Friedman could not think of one when asked.

Under this theory, the only relevant factor is Friedman's lack of knowledge. His "guess" adds nothing to what the jury already had when Wong testified, ". . . he told me he didn't know" (Tr. I: 167). Once Friedman said he didn't know, any speculations he thereafter makes have no probative value. Allowing Wong to testify as a Friedman's speculations was plain error and highly prejudicial.[8]

The prejudice is highlighted by plaintiff here (Br. pp. 18-19, 37) by referring to it as "Friedman's state of mind 'European deal' admission" (Br. p. 37). In no sense was the reference to a "European deal" an admission. If plaintiff were simply trying to show Friedman's state of mind, the reference should have been to Friedman's inability to give a good business reason, not to his "European deal" admission. This was precisely how the jury was misled on the issue of conspiracy.

---

[8]Had the court sustained defendants' objection, that part of Friedman's testimony guessing about a European deal between Seagram and McKesson would not have reached the jury's ears (see Tr. I: 167-168).

The court's instruction does not cure the error because it too was erroneous. In *Spencer v. Texas,* 385 U.S. 554 (1967), cited by plaintiff, the evidence was admissible for one purpose but not another, and the court gave the proper instruction. Here, the speculations were admissible neither for their truth nor for Friedman's state of mind.

The statement of this Court in *Flintkote Company v. Lysfjord,* 246 F.2d 368 (9th Cir. 1957), cert. denied 355 U.S. 835 (1957) is apposite in referring to the erroneous admission of hearsay on the alleged conspiracy:

> The full effect of this evidence on the jurors' minds cannot be measured with precision. To deny that it influenced the jury's verdict in a material manner is to ignore reality. (p. 386.)

Accord:

Beck v. Wing's Field, Inc., 122 F.2d 114 (3d Cir. 1941);

Farris v. Interstate Circuit, Inc. 116 F.2d 409 (5th Cir. 1941).

Contrary to plaintiff's assertion, this testimony was the only evidence suggesting any possible improper motive in the entire case. Although it labels this contention "astounding," (Br. p. 58), the court will note the absence of any record reference to any other evidence of improper motive.

B. Evidence of Portside's performance after the change in distributors

Plaintiff argues (Br. p. 59) that the evidence of Portside's 1966 performance was introduced not to show that defendants should have known that Portside would do a poor job, but to show that Hawaiian Oke was doing a good one. No matter how plaintiff phrases it, this evi-

dence was simply an attempt to second-guess Seagram and Barton.

The question is: What was the situation in June 1965? The figures for 1966 of course were not on hand. The record is uncontradicted that Calvert had complained about the poor sales performance of Calvert Extra, its most important product, and about the distribution of the product, particularly on the outer islands. It is likewise uncontradicted that the Barton ratio of brown to white goods had fallen off from approximately 60-40 in 1962 to 48-52 in 1965. Barton had complained of plaintiff's chronic delinquency in paying bills as far back as 1962 and in October 1963 had decided to make a jobber change (Op. Br. p. 5). These were the facts that were available to the suppliers in 1965.

None of the cases cited by plaintiff (Br. p. 60) supports admission of the 1966 Portside data. In each, evidence of prior or subsequent acts of the defendants was admissible to show a continuing combination, a common design, or monopolistic or conspiratorial intent and purpose. None sanctioned a comparison of the sort received in evidence here.

Obviously, the fact that Portside did not do well in 1966 does not tend to prove that Hawaiian Oke was doing well in 1965. The evidence was irrelevant and served only to mislead and prejudice the jury.

III

ERRORS IN INSTRUCTIONS ON LIABILITY

A. Unincorporated divisions of a single corporation cannot conspire among themselves

1. The intracorporate conspiracy issue is not moot

Plaintiff argues that the question whether intracorporate divisions can conspire among themselves is moot because the jury returned a verdict against all defendants (Br. pp. 91-92). This contention is without merit.

Under the trial judge's instructions, the jury did not have to find any agreement between Seagram and Barton to impose liability on both. The jury was instructed:

> One who knowingly joins an existing conspiracy or combination is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.
>
> . . . It is not necessary to a conspiracy that all of the conspirators be a part of the conspiracy from the beginning. A person may join a conspiracy after it has been agreed upon. (Tr. 3211-12.)

The jury had previously been instructed:

> Nor would it be a defense that the parties defendant may have believed what they were doing was legal. This is because the law provides that combinations or conspiracies involving a refusal to deal cannot be excused even for legitimate business reasons. (Tr. 3208.)

With these instructions, the jury could have imposed liability under the theory that the three Seagram divisions agreed among themselves to change to McKesson and that Joseph E. Seagram and Barton thereafter joined the "conspirary."[8a] Under this theory, the divisions question is crucial. If combination among the

---

[8a]Such a finding has no support in the evidence.

divisions is illegal and Barton learns of it, then innocent parallel behavior is transformed into "knowingly joining an existing conspiracy." Under the instructions, Barton's unawareness of the illegality of the "combinaton" does not save it from liability.

Because the general verdict many have rested on a "conspiracy" among the divisions, reversal is required. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.,* 370 U.S. 19 (1962).

2. Conspiracy among the divisions: The merits

Plaintiff makes the Alice in Wonderland argument that although the divisions of The House of Seagram have no independent legal existence, they must be treated as though they did if they normally compete with each other for sales. It makes the flat assertion that a decision to foster intracorporate competition "bears certain consequences under the antitrust laws." (Br. p. 96.) No case so holds. *United States v. Yellow Cab Co.,* 332 U.S. 218 (1947) and *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211 (1951), cited by plaintiff, concerned separate corporations affiliated under common ownership.

In another case holding corporate subsidiaries liable under Section 1, government counsel conceded that if there had been only one corporation with intracorporate departments, " . . . that would not be a conspiracy. You must have two entities to have a conspiracy." *Timken Roller Bearing Co. v. United States,* 341 U.S. 593, 606 (1951).

The Supreme Court has recently emphasized this:

> But since respondents . . . availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could

> not save them from any of the obligations that the law imposes on *separate entities.* (emphasis supplied)
>
> *Perma Life Mufflers, Inc. v. International Parts Corp.,* .... U.S. ...., 88 S.Ct. 1981, 1986 (June 10, 1968).

The Sherman Act was never intended to apply to intracorporate agreements. Section 8 states that "person" shall include corporations and associations; it does not say intracorporate divisions.

Moreover, the trial court's novel ruling in no way furthers antitrust policy. As pointed out (Op. Br. p. 20), Section 2 of the Act subjects activity by a single corporation to antitrust sanctions. Had Congress intended the Act to apply to agreements among directors, employees and internal divisions of a single corporation in the absence of conduct proscribed by Section 2, it would have said so in Section 1.

Plaintiff refers to the "market power" of the "combination" (Br. 96). This is another false issue. If the decision-making power were vested in a single executive of The House of Seagram, the effect on plaintiff would be no different. That decisions are normally made autonomously adds nothing to Seagram's market power. If the power is excessive, the remedy is Section 2. Monopoly was charged in the complaint but abandoned.

Plaintiff (Br. p. 93) tries to distinguish *Nelson Radio & Supply Co. v. Motorola, Inc.,* 200 F.2d 911 (5th Cir. 1952), cert. denied 345 U.S. 925 (1953) and *Poller v. Columbia Broadcasting System, Inc.* 284 F.2d 599 (D.C. Cir. 1960) rev'd. on other grounds 368 U.S. 464 (1962) as being applicable only to an agreement between a corporation and its division rather than between the divisions themselves. It fails, however, to explain the significance of this distinction.

Obviously there is none. The crux of those decisions is that unincorporated divisions have no separate identity apart from the corporate entity of which they are branches.

Plaintiff emphasizes that consultation between the divisions was a departure from normal procedure (Br. p. 3) but it does not explain how this rises to the level of an antitrust violation.[9] Normally the managers of the departments of a large retail department store would not consult each other on marketing problems, but this should not prevent them from doing so if a problem of mutual interest arises. There is no reason why the fact that the products of a single corporation are normally marketed by different groups of employees should convert intracorporate consultation into a Sherman Act offense.

Plaintiff is groping for some theory of estoppel. However, as we pointed out in our opening brief (p. 18), Hawaiian Oke was not misled into believing that it was dealing with three independent entities. Every bill ever received was from The House of Seagram, Inc. In any event, the issue of deception was never raised, and if it had been, it would have been a question for the jury rather than the trial judge.

Even if we amend the Sherman Act to read that an intracorporate division is a "person," plaintiff's suggested test for determining independence is wrong. It contends that since the only activity under attack is sales, all other corporate functions are immaterial (Br. pp. 95-6). Thus, while arguing that defendants' activities

---

[9]Plaintiff pressed this untenable argument on the trial judge who accepted it and included the proposition in his post verdict opinion (Op. Br. pp. 16-18).

must be viewed in their "totality" in determining if an offense was committed (Br. p. 31), it says that Seagram's functions must be compartmentalized in determining if the divisions are "separate entities."

Sales do not exist in a vacuum. Other factors—overhead, payroll, accounting, advertising and the ability to obtain raw materials—all affect pricing and marketing decisions. These factors, plus the fact that the divisions do not have limited liability and that the assets of the entire House of Seagram are available to anyone with a claim against any of the divisions, the fact that personnel are freely shifted from one division to another, the fact that all employees are paid from the same treasury, the fact that all divisions use the same contract, and one bookkeeping department handles all billing would be relevant in determining whether the divisions are "separate entities." To ignore them ignores reality.[10]

Plaintiff says that the antitrust laws are concerned with substance, not form. We agree. From any common sense, practical standpoint, The House of Seagram is one business, not three or four. Despite the fact that the divisions try to outperform each other, the personnel of the divisions all work for the same company. Their futures depend on the success of that company. To adopt plaintiff's theory would forbid a large corporation from organizing in such a way as to carry on business as a unified enterprise while still preserving some autonomy in the intracorporate decision-making process.

---

[10]Plaintiff's statement (Br. p. 96) that our description of the Seagram structure is outside the record is untrue. See references (Op. Br. p. 15). Statements without record references are legal consequences.

The necessary consequence would be to centralize all intracorporate decision-making. This would not further antitrust policy but would saddle large corporations with inefficient and archaic internal structures. *Yellow Cab* and similar cases should not be extended, *reductio ad absurdum,* to reach such a result.

B. A parent corporation may lawfully instruct its wholly owned subsidiary to change distributors

The court told the jury to impose liability if it found that Joseph E. Seagram and Sons, Inc. induced any of the unincorporated divisions of The House of Seagram to initiate or join a "combination or conspiracy" to terminate Hawaiian Oke and establish Portside. The court instructed the jury that participation in a plan knowing the consequence of which was to restrain trade was sufficient to establish a conspiracy. (Tr. VIII: 3212.)[11]

Thus the jury was permitted to impose liability without finding an unreasonable restraint of trade, if it found that Joseph E. Seagram and Sons, Inc. induced the three divisions to participate in McKesson's formation of Portside. There was no requirement in the charge that Seagram be aware of Barton's participation.

If Barton, on learning of Seagram's "unlawful" conduct, also participated in the "plan," it thereby joined the conspiracy and was liable too (see Point II-A *supra).*

We do not quarrel with the instructions on knowingly joining an existing conspiracy. Cf. *Flintkote Co. v. Lysfjord, supra* at 375. Nor with the proposition that under certain circumstances, a conspiracy may be found to exist between a parent corporation and its wholly owned

[11]The jury was told that the word "parties" as used in the court's charge included the unincorporated divisions as well as The House of Seagram, Inc. and Joseph E. Seagram and Sons, Inc.

subsidiary. Cf., *First National Bank of Arizona v. Cities Service, Inc., supra.* We do, however, take issue with the proposition that it is, without more, an offense under the Sherman Act for a parent corporation to direct or advise three unincorporated divisions of its wholly owned subsidiary to change distributors.

It is important to note that the jury was not required under these instructions to find a combination between or among the divisions themselves. Per se liability could thus have been imposed absent a finding of any horizontal agreement. As we pointed out, this goes beyond any group boycott case and is without precedent (Op. Br. pp. 44-45).

Plaintiff's only answer, other than arguing it is harmless error and moot (Br. pp. 91-96), is to cite *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., supra* and *United States v. Yellow Cab Co., supra.* Neither is authority for imposing per se liability under the circumstances present here. *Kiefer-Stewart* was a horizontal pricefixing combination between two wholly owned subsidiaries, and *Yellow Cab* involved a far-flung vertical and horizontal conspiracy to monopolize.

More in point is *Alpha Distributing Co. v. Jack Daniel Distillery,* 207 F.Supp. 136 (N.D. Cal. 1961), aff'd 304 F.2d 451 (9th Cir. 1962). There the court denied a preliminary injunction based on the contention that a change of distributors by the subsidiary at the request of or in concert with the parent corporation was a per se Sherman Act violation. The court stated:

> . . . it is doubtful that mere concert of such affiliates for the purpose of exercising their right, as a single business unit, to . . . select a chosen distributor, and nothing more, constitutes a per se violation . . . there should be a showing either that the defendants were not acting as a single business

> unit, or if they were, that any restraint of trade resulting from their action was in fact unreasonable. (Pp. 137-138.)

Here no evidence shows that in selecting the Hawaii distributor, the parent and its wholly owned subsidiary were acting other than as a single business unit. The parent marketed its products through its subsidiary. Since at the time in question there was no president of The House of Seagram,[12] it was natural for the parent to convey its suggestions to the subsidiary through the personnel of the several divisions.

The court's instruction permitting the jury to impose per se liability under these circumstances was a gross misapplication of the law.

C. Selection by Seagram and Barton of Portside as a common distributor not a group boycott

Plaintiff evades the question whether the defendants' alleged conduct constitutes a group boycott. It argues that because the court instructed the jury that a "plan" to terminate Hawaiian Oke was illegal per se, the instruction was correct (Br. 49-51). In so doing, it fails to come to grips with the question whether a decision to use Portside as a common distributor that results in the termination of Hawaiian Oke should be treated differently from a "plan to terminate" Hawaiian Oke.

An agreement between two suppliers whereby each agrees not to deal with a particular distributor is on its face a naked restraint of trade. Such an agreement is illegal per se and cannot be saved by showing good motives.

---

[12]Sichel had been president previously, but no one had been elected to replace him (Tr. III: 948).

But an agreement to use a common distributor is not a naked restraint of trade. Here both suppliers had used plaintiff as their distributor. But what would be the result if Barton had previously used another, such as Johnston & Buscher? If Barton was dissatisfied and, in order to make the new house possible had agreed with Seagram to participate in its formation, would such conduct be illegal per se? As a result of such an understanding Seagram would terminate its dealings with Hawaiian Oke, Barton would terminate its dealings with Johnston & Buscher, and both would "refuse to deal" with anyone but Portside. Obviously, this could not be a group boycott of Hawaiian Oke and Johnston & Buscher.

If this is so, why should the fact that Seagram and Barton happened to use the same distributor change the result? This would mean that while suppliers who used different distributors could participate in the formation of a new one, those who used the same distributor could not.

Here, McKesson, an established concern, became the distributor for both. But if the per se theory is accepted, it would apply with equal force to any newcomer attempting to break into the market. If Seagram and Barton are dissatisfied with Portside and are solicited by a newcomer, they would be barred from participating in the formation of a new house. Plaintiff's theory would inevitably result in freezing the industry in status quo.

Plaintiff urges that the new house *could not have been formed* without the participation of both Seagram and Barton. It says that their decision could not have been made independently because neither would have been so foolish to commit its own lines to McKesson without knowing what other lines McKesson had obtained to fill out its house (Br. p. 35). If this is true, how then could a new distributing house ever be formed? If Seagram

is dissatisfied with Portside, it may move to an existing distributor or abandon the use of distributors altogether and simply integrate vertically. But unless it can find a new distributor who will take on its lines alone (which plaintiff argues is impossible), it cannot participate in the formation of a new house.

Such result was never intended to flow from *Klor's* and *General Motors*.

Over objection (Tr. VIII: 3146), the court gave an instruction that failed to distinguish between an agreement "to terminate" and an agreement to accept McKesson's solicitation, of which termination of Hawaiian Oke was a by-product. Plaintiff offers no reason why the latter should be condemned out of hand under the antitrust laws. Such an agreement, not being anticompetitive on its face and not having as its purpose the infliction of injury on another, must be tested by the rule of reason.

D. The instructions on conscious parallelism

The trial judge told the jury it could infer a conspiracy from conscious parallelism alone. Plaintiff disputes this, saying, "Parallel business behavior, the jury was told, does *not* of itself establish proof of an agreement" (Br. p. 52).

Conveniently, plaintiff omits the key word from the instruction—the word "necessarily." The record is clear that the jury was instructed that while parallel conduct does not "necessarily" establish proof of an agreement, it was evidence from which an agreement could be inferred (Tr. VIII: 3202).

The trial judge himself understood that he was telling the jury it could find a conspiracy from parallel behavior alone:

> Well, I simply say that the fact alone that they acted in a parallel manner may support an inference,

> that is, as I understand the law to be and would hold it to be in this or any other case. (Tr. VIII: 3000.)

It is incredible that plaintiff would now argue that our rejected instructions merely "restate in a different style and with different emphasis" the trial court's instructions on conscious parallelism (Br. pp. 53, 54). The court was asked point blank if it would give an instruction that would incorporate this Court's decision in *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656 (9th Cir. 1963), cert. denied 375 U.S. 922, that conspiracy may not be inferred unless there is

> a sameness of conduct under circumstances which logically suggest joint agreement as distinguished from individual action. (Tr. VIII: 3001-2.)

It refused, not because it felt it was giving the same instruction "with different emphasis," as plaintiff now claims, but because, as the trial judge put it:

> I hold that the Independent Iron Works dicta is wrong. (Tr. VIII: 3005.)

The instructions quoted by plaintiff (Br. pp. 53-54) do not cure the error. They would prohibit a finding of conspiracy where there is unconscious parallel behavior, but they permit an inference of conspiracy from conscious parallelism alone.

Thus the jury was told that conscious parallelism was evidence from which conspiracy might be inferred. To this, the Court should have added that conspiracy was not to be inferred from such behavior unless the circumstances logically suggested joint agreement as distinguished from individual action. That is what our Instruction B-9 said (Error No. 8, App. Op. Br. xvii), and what this Court held in *Independent Iron Works* and the Third Circuit in *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199 (3d Cir. 1961), cert.

denied 369 U.S. 839. That is also what the Supreme Court held in *Theatre Enterprises, Inc. v. Paramount Film Distributing Co., supra,* and *First National Bank of Arizona v. Cities Service Corp., supra.*[13] By refusing to include such a caveat in its instruction, the court permitted the jury to infer a conspiracy from conscious parallel behavior alone. This was reversible error.

IV

ERRORS IN ADMITTING EVIDENCE ON DAMAGES

To divert attention from the issue, plaintiff begins its argument on damages with a dissertation on the sufficiency of the evidence (Br. p. 61 et seq.). This is not before the court. The issue is not sufficiency of the evidence, but the trial court's disregard of the rules of evidence.

A. Admission of exhibits to prove going concern value

1. Mathematical representations of counsel's argument were admitted as evidence

At trial, plaintiff insisted that Exhibits P-2, 3, 4 and 5 were merely representations of counsel's theories and objected that defendants were:

> trying to cross-examine (Caldwell) as though he is vouching for these (exhibits) and that he is an expert. (Tr. 1141.)

Now, in a transparent attempt to re-cast what took place below, plaintiff tries to defend their admission as expert evidence. (Br. pp. 68-73.)

---

[13]Plaintiff's attempt to distinguish *Theatre Enterprises* on the ground that it merely affirmed a jury verdict is shown to be fallacious by *Cities Service,* which applied the *Theatre Enterprises* rationale in sustaining summary judgment.

The exhibits were not offered as Caldwell's opinions and conclusions. He was "merely a dummy, Mr. Blecher" (Tr. III: 1141, 1151, 1072-3). In translating counsel's theories into figures, he used some accounting expertise to select certain alternative methods of computation (Tr. III: 1173). But as plaintiff admitted, the expertise was restricted to "very limited areas" and was not "traditional" expert testimony in the sense that Caldwell was "vouching" for the exhibits. (See Op. Br. pp. 48-52: Tr. III: 1072-3, 1141, 1172.)[14]

Caldwell made clear that the exhibits were not offered as his opinion of future profits:

> Mr. Anderson: Do I also understand that in preparation of Plaintiff's Exhibits 2, 3, 4, 5 and 6 you simply followed Mr. Blecher's instructions with respect to the mathematical computations?
>
> Mr. Caldwell: That is correct, sir. (Tr. III: 1151.)

We do not say that counsel may not use a chart or blackboard in argument, nor that charts and graphs representing the opinions of an expert witness are inadmissible. But counsel's arguments may not be converted into evidence by embodying them in charts prepared by an accountant acting as his "dummy."

The fact that Caldwell was a CPA and used some accounting techniques in preparing the charts does not change their essential character as argument of counsel. Unless they represented the accountant's opinions, based on his understanding of accounting principles, the exhibits had no probative value.

Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709 (9th Cir. 1959), cited by plaintiff, does not sanction

---

[14]Contrary to plaintiff's assertion (Br. p. 69), Caldwell never testified that he used the most conservative method of projecting future profits. He stated that as to one figure—the percentage increase of sales—the alternative selected by counsel was the most conservative that he had been able to think of (Tr. III: 1173-8).

the presentation of counsel's argument through a "dummy" expert witness. That decision permits *counsel* to outline his computations as part of his *argument,* as in a personal injury case (Id. p. 714). There, using properly admitted evidence, "*counsel* . . . presented to the jury a realistic formula." (Id. p. 715, emphasis supplied.)

If the opinions and conclusions in the charts are counsel's, they must be presented so that the jury clearly understand that they are part of his argument. They may not be mouthed by an "expert" to give them an air of evidentiary validity.

Not only does this artifice mislead the jury, but it deprives defendants of their full right of cross-examination.

We were allowed to examine Caldwell as to why he selected certain methods in presenting counsel's arguments but every attempt to determine whether the projections had any relevance to valuing a business was rebuffed. (Tr. III: 1152-6, 1161, 1169-70, 1177-8, 1189, 1190, 1236-7.)[15]

It is no answer to say that Caldwell was not offered as an expert on valuation. The only issue was value. Expert opinion of estimated future profits is relevant in determining value. If Caldwell was giving his opinion that the projections represented a reasonable estimate of future profits, consonant with sound accounting practices, they had relevance. If he was not "vouching" for

[15]Plaintiff's footnote 11 (Br. p. 71) is a distortion. Our cross-examination included unsuccessful attempts to establish relevancy, to segregate the roles of witness and counsel, questions on the source and use of unaudited figures, and examination on exhibits not here at issue. Cross-examination on March 30 covered 5 pages in which Caldwell answered 12 questions. Cross-examination was constantly interrupted by objection (32 times); 18 were sustained.

them but simply used his expertise to arrive at various alternatives which might or might not be consistent with accepted accounting principles, their probative value was nil.

Plaintiff now claims that this was "relevant data" to value plaintiff's business when every attempt to ascertain their relevance was denied.

Counsel now claims on appeal that an exhibit using price-earnings ratios to arrive at a value represents Caldwell's expert opinion although he successfully prevented cross-examination on the ground that Caldwell had no qualifications to value a business.

Plaintiff attempts (Br. p. 72) to distinguish *Berguido v. Eastern Air Lines, Inc.,* 317 F.2d 628 (3d Cir. 1963), cert. denied 379 U.S. 852, on the ground that Caldwell did not claim expertise in valuing a business. Here, as in *Berguido,* calculations were received and the person responsible for the underlying assumptions was not put on the stand. The court held that the admission of this hearsay was prejudicial error.

Plaintiff argues (Br. p. 70) that the error was cured because the jury was instructed that although it might treat the exhibits as Caldwell's expert opinion, it was free to reject them if it wished. This is no cure. The fact is that the jury was permitted to treat the exhibits as expert evidence although they were simply mathematical representations of counsel's argument.[16]

---

[16]The fact that the jury's verdict was lower than suggested by the exhibits is immaterial. Had they been excluded or defendants afforded the opportunity to cross-examine as to the underlying theories and the relevance, the verdict would have been far lower or even nominal.

2. The exhibits were inadmissible as expert opinion

Although Caldwell was offered only as an expert in "computation," plaintiff now seeks to defend the admission of these exhibits as Caldwell's expert accounting opinions. Apart from commingling of argument and evidence, the exhibits did not meet the requirements of expert opinion.

a. No foundation was laid to qualify Caldwell as an expert in profit projections

Plaintiff says that Caldwell was offered as "an expert in accounting and computation" (Br. 71). At the trial he was offered as an expert in computation, not as an expert in profit projection (Tr. III: 1072-3; 1141, 1151-4). Counsel stipulated "that anybody with a good education could make a mathematical computation." (Tr. III: 1151).

Had Caldwell been offered as an expert on profit projections, defendants would have had the opportunity to question him on his qualifications. Evidence cannot be introduced on one theory and then on appeal defend its admission on another. *Standard Oil Co., of California v. Moore, supra* at 217-18.

b. The exhibits were irrelevant to the issue of market value

No witness testified that the exhibits were relevant to market value. If not relevant, they were not admissible. *Standard Oil Co. of California v. Moore, supra* at 219-20. Not only did plaintiff fail to establish relevance, but defendants were precluded from exposing the defect.

As pointed out in our opening brief (p. 54), the projections were based on figures including income from property not owned by the plaintiff—the leasehold that

had been transferred to Thelma Wong. The fact that the expenses of the leasehold were included does not cure the defect. Plaintiff's records did not segregate the leasehold expenses from others. The admission of irrelevant data was error.

c. **The exhibits are based on assumptions not supported by evidence**

Plaintiff lamely defends the assumptions underlying the projections by pointing to McKesson's experience and asserting that the jury might have found that plaintiff's 1965 second-half gross sales would have exceeded its first-half sales notwithstanding the ''June balloon'' (Br. p. 74). This is immaterial.

The question is: What in this record supports the assumption that plaintiff's 1964 pattern would have applied to the unique conditions in 1965?

This assumption produces an increase in sales of $230,000 with a decrease in expenses of $80,000 (Op. Br. pp. 55-57). No evidence was offered to explain the absurd result.

Plaintiff argues that our objections based on the unfounded assumptions go only to the weight. This is not so. Mathematical computations based on unfounded assumptions or on assumptions in conflict with the evidence are inadmissible. (See Op. Br. pp. 60-62.)

Connecticut Importing Co. v. Frankfort Distilleries, 101 F.2d 79 (2d Cir. 1939), cited by plaintiff, holds that errors in computations may be brought out on cross-examination. It does not hold that projections based on unfounded assumptions are admissible. This was made clear in *Herman Schwabe, Inc. v. United States Shoe Machinery Corp.,* 297 F.2d 906 (2d Cir. 1962), cert. denied 369 U.S. 865 (1962) and *Syracuse Broadcasting Co. v. Newhouse,* 319 F.2d 683 (2d Cir. 1963).

Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co., 284 F.2d 1, 30 (9th Cir. 1960), mod. 289 F.2d 933, rev'd on other grounds, 370 U.S. 19 and *Lessig v. Tidewater Oil Co.,* 327 F.2d 459, 473 (9th Cir. 1964), cert. denied 377 U.S. 993 (which plaintiff ignores) make clear that the law in this circuit is in accord.

3. Use of McKesson as a "yardstick"

Exhibit P-4 is based on the assumption that had plaintiff remained in business, it would have had the same ratio of net income to sales that McKesson had in the years 1962-1964. No evidence was introduced to support this assumption. Both firms operated in a free market. McKesson's ratio averaged 3.05% while plaintiff's was 0.40%. (Exs. P-1, P-4; Op. Br. p. 66.)

Plaintiff defends the assumption because:

1) Abe Kauhane and Ted Wong had similar backgrounds;

2) Hawaiian Oke's *gross sales* were better than Portside's as to certain products acquired by Portside in the 1965 change of distributors;

3) Seagram had not been satisfied with McKesson's pre-1965 performance as to the Four Roses Kessler line and the Frankfort McKenna line; and

4) Both firms operated in the same area. (Br. 77.)

These facts do not establish the comparability of the net income to sales ratio, the question in issue.

The question is *not* whether Hawaiian Oke would have sold as many cases of liquor as Portside (or more), but whether its net income would have been 3.05% of such sales. Had plaintiff been able to lay a foundation by

showing some comparability to McKesson's ratio in 1962-1964, it might have been reasonable to apply that ratio to its projected 1965-1969 sales.

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946) holds that where a plaintiff's earnings were abnormally low due to the conspiracy, earnings of a similar establishment that has not been affected by the violation may be used as a yardstick. No case sanctions the yardstick test where the two businesses *were* in operation during the same period, free from an antitrust violation, where it is uncontradicted that they were not comparable in the aspect sought to be compared.

Ted Wong may have had a good background, but Hawaiian Oke's ratio of net profit to sales never exceeded 0.70% from 1962-1964. McKesson may not have done particularly well with the Kessler and McKenna lines, but it maintained 3.05% ratio of its net income to sales. Portside may not have sold as many cases of liquor in 1966 as Hawaiian Oke did previously; the comparison, however, was not with Portside's 1966 sales, but McKesson's net income to sales ratio for 1962-1964.

As this Court stated in *Flintkote Co. v. Lysfjord*, 246 F.2d 368 (9th Cir. 1957), cert. denied 355 U.S. 835 (1957):

> Where no basis for comparison was shown such evidence has been rejected. (246 F.2d at 393)

Plaintiff would have this Court believe that in *Wm. Goldman Theatres v. Loew's, Inc.*, 69 F.Supp. 103 (E.D. Pa. 1946), aff'd 164 F.2d 1021 (3d Cir. 1948), cert. denied 334 U.S. 811 (1948), the comparison was allowed despite major differences in "extremely important" factors (Br. 78-79). Contrary to plaintiff, the court found the differences insignificant and would not "have any noticeable effect on the (plaintiff's) business" (69 F. Supp. at 107-8).

Furthermore, in the *Goldman* case, the comparative figures were not available. The plaintiff had been prevented from operating his theatre because of the conspiracy. The court stated:

> . . . (W)here the tort itself has created a partial blackout, the standard which plaintiff's evidence must meet will be somewhat lowered. (69 F.Supp. at 106.)

Here, the figures are known. Nothing in the evidence justifies the assumption that plaintiff's ratio of net income to sales would suddenly have jumped by over 750%.

B. Evidence of expressions of interest in purchasing plaintiff's business was erroneously admitted

The only question before the jury on damages was whether plaintiff's business had a value above the $149,000 received on liquidation. Any evidence not probative of this question was irrelevant.

Ted Wong's testimony that five persons expressed interest in purchasing Hawaiian Oke does not have the slightest tendency to prove that the business was worth more than $149,000. Not one ever made an offer. As in *Dantzler v. Dictagraph Products, Inc.,* 309 F.2d 326 (4th Cir. 1962), cert. denied 372 U.S. 976, none of them was called as a witness by plaintiff. The jury was left to speculate what they would have offered, if anything.

Lindus (referred to by Wong) was called by defendants. He, like the others, lost interest as soon as he saw the financial statement (Tr. V: 1812-13).[17]

The admission of the irrelevant testimony was prejudicial error. See, *Dantzler v. Dictagraph Products, Inc., supra* at 329-30.

---

[17]Gonzales mentioned a figure of $360,000 for a possible purchase of *both* Hawaiian Oke and Von Hamm-Young, without allocating the price between the two.

C. The court erred in admitting evidence of plaintiff's out-of-pocket losses

Plaintiff's argument on the admissibility of out-of-pocket loses over the years 1959 through 1966 rests entirely on Exhibits P-2, 3 and 4—the profit projections. They show that if plaintiff had remained in business with Seagram and Barton lines, it would have made a profit in 1965 and 1966. Exhibit P-6 simply shows net losses for these years.

If Exhibits P-2, 3 and 4 were admissible to show profits, the jury might conclude that the losses resulted from the change of distributors but those exhibits were inadmissible.

The cases cited by plaintiff to support the proposition that the jury must be permitted to draw the inference of causation have not been applied where plaintiff makes no effort whatsoever to show why a particular loss was attributable to the defendant's conduct. Here, plaintiff alleged a conspiracy and simply showed that in 1965 and 1966 it lost money. Something more than this is required. *Talon, Inc. v. Union Slide Fastener, Inc.*, 266 F.2d 731 (9th Cir. 1959).

V

ERRORS IN INSTRUCTIONS ON DAMAGES

A. Instruction permitting consideration of future profits

From plaintiff's description of the court's instruction (Br. 84), one might think that the court "specifically" told the jury that future profits were to be considered only as they bore on the question of market value. A reading of the instruction (Op. Br., App. p. xxv) shows that this was not made clear. After the jury was charged that they could consider all the facts and circumstances on the question of lost value, it was then told that they could consider "the question of future profits."

The refusal to give Instruction M-C, which would have removed the ambiguity, was error.

B. Instruction on interest of third parties in purchasing Hawaiian Oke

Plaintiff states, "There were clear indications that in purchasing such a business, a price in excess of liquidation could be commanded" (Br. 85). The transcript references (Tr. 385-6 and 1645-6) do not support the statement.

One passage relates to the purchase by McKesson of another distributor and to the fact that in purchasing a distributor, the buyer and seller must work out an agreement on the price. The other is the Gonzales testimony discussed above.

The cases cited by plaintiff have nothing to do with the error in the court's instruction.

C. Instruction relating to Caldwell

As was admitted below, Caldwell was presented as a "dummy" witness to mouth the theories of counsel. Not only were the exhibits admitted as expert evidence, but the jury was told that they might treat them as such:

> The testimony of an accountant . . . and any charts or graphs prepared by him and admitted in evidence were received for the purpose of explanation of the facts disclosed by the books and records and other documents which are in evidence. . . . (Tr. VIII: 3193-94.)

The jury was also told that Caldwell was "an expert in accounting" and that it could give each expert opinion whatever weight it thought it deserved. (Tr. VII: 3193.)

The Caldwell exhibits, however, were *not* an accountant's explanation of the facts, and Caldwell was not pur-

porting to give expert opinion testimony, except in a "very limited" sense. (Tr. III: 1072-3, 1141, 1151, 1172-3.)

While the jury was told that the charts were not "in and of themselves" evidence and were to be disregarded if they did not correctly reflect the figures in evidence or were not "summaries of facts and figures shown by the evidence" (Tr. VIII: 3194), this does not cure the error. Unlike Caldwell's graphs (Exhibits P-106-114), the projections were *not* summaries of figures in evidence. They were an accountant's rendering of counsel's inferences drawn from the facts. There was no question as to whether the charts accurately reflected figures in plaintiff's books. The question was whether this was expert opinion testimony at all.

The vice of these instructions is that they permit the jury to give the projections weight as expert opinion testimony if they find that the underlying figures are correct reflections of what appears in plaintiff's books.

The error was compounded by the court's refusal to give proposed Instruction B-25, which would have made clear to the jury that Caldwell simply prepared the projections in accordance with the instructions of plaintiff's counsel.

D. Refusal to give instructions relating to Hawaiian Oke's rental income

Plaintiff states that the fact that the leasehold was not owned by the corporation was "unimportant to the crucial question of the 'going concern' value . . ." (Br. p. 88). As this Court made clear in *Standard Oil Co. of California v. Moore, supra,* the transferability of value *is* crucial in determining whether a firm has going concern value and, if so, how much. If an aspect of the business is not transferable, it is not to be considered in determining going concern value.

Plaintiff could have called its accountant to estimate the expenses attributable to the rental income. The fact that its statements showed only the irrelevant income and did not segregate the irrelevant expenses cannot be blamed on defendants and cannot make the jury's consideration of the income permissible. The argument that this went to the weight of the evidence is without merit.

CONCLUSION

For the reasons set forth herein and in our opening brief, the judgment should be reversed with direction to enter judgment dismissing the complaint.

Dated, Honolulu, Hawaii,
August 9, 1968.

Respectfully submitted,
J. Garner Anthony,
Attorney for Appellants
Joseph E. Seagram and Sons, Inc.
and The House of Seagram, Inc.
Martin Anderson,
Attorney for Appellant
McKesson & Robbins, Incorporated.
Herbert Y. C. Choy,
Attorney for Appellants
Barton Distilling Company and
Barton Western Distilling Co.

Of Counsel:
Robertson, Castle & Anthony,
Ninth Floor, 333 Queen Street, Honolulu, Hawaii,
White & Case,
14 Wall Street, New York, N.Y.,
Anderson, Wrenn & Jenks,
Bank of Hawaii Building, Honolulu, Hawaii,
Fong, Miho, Choy & Robinson,
Finance Factors Building, Honolulu, Hawaii.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. Garner Anthony,
Attorney for Appellants.